Lien Chung Credit & Leasing Sdn Bhd v Chang Chin Choi

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-7-1990
MOHD GHAZALI JC
3 JULY 1994

Moneylenders *— Promissory note — Postdated cheque — Whether a security within s 16 of Moneylenders Ordinance 1951 — Moneylenders Ordinance 1951 s 16 — Bills of Exchange Ordinance 1949 ss 13(2) & 73(2)*

Words and Phrases *— 'Security' — Moneylenders Ordinance 1951 s 16*

This was an appeal against the decision of the sessions court judge dismissing the claim of the appellant under the Moneylenders Ordinance 1951 ('the Ordinance'). The sessions court judge had held that the failure to mention the giving of a postdated cheque as security in the memorandum of loan was a non-compliance with s 16(3) of the Ordinance which was fatal to the claim. The main issue which arose for decision was whether a postdated cheque was a security within the contemplation of s 16(1) of the Ordinance.

Held, allowing the appeal:

(1) The word 'security' would seem to imply something which the creditor could resort to in order to aid him in realizing or recovering the debt, in case the debtor failed to pay.

(2) A postdated cheque was not payable on demand and hence could not fall within the definition of 'cheque' in s 73(2) of the Bills of Exchange Ordinance 1949. It had no value as it did not represent any property that a creditor could resort to in the event he wanted to realize or recover the debt. Such a cheque was not a security within the contemplation of s 16 of the Ordinance and therefore did not have to be included in the memorandum.

[Bahasa Malaysia summary

Ini adalah satu rayuan terhadap keputusan hakim mahkamah sesyen yang telah menolak tuntutan perayu di bawah Ordinan Pemberipinjam Wang 1951 ('Ordinan itu'). Hakim mahkamah sesyen telah memutuskan bahawa kegagalan menyatakan pemberian satu cek yang tertunda tarikhnya sebagai cagaran di dalam memorandum pinjaman adalah suatu ketidakpatuhan s 16(3) Ordinan itu yang membawa padah pada tuntutan itu. Isu utama yang berbangkit untuk keputusan adalah sama ada suatu cek yang tertunda tarikhnya adalah suatu cagaran ('security') di dalam lingkungan s 16(1) Ordinan itu.

Diputuskan, membenarkan rayuan itu:

(1) Perkataan 'security' nampaknya membayangkan sesuatu yang boleh digunakan oleh pemiutang untuk membantunya mendapat kembali jumlah yang terhutang, jika peminjam gagal membayar balik hutangnya.

(2) Suatu cek yang tertunda tarikhnya tidak semestinya dibayar apabila dituntut dan oleh kerana itu tidak termasuk di dalam definisi 'cek' dalam s 73(2) Ordinan Bil Pertukaran 1949. Ia tidak mempunyai nilai kerana ia tidak mewakili sebarang harta yang boleh digunakan oleh pemiutang jika beliau ingin mendapat kembali jumlah yang terhutang. Cek sedemikian bukannya satu cagaran di dalam lingkungan s 16 Ordinan itu dan lantaran itu tidak wajib dinyatakan di dalam memorandum pinjaman tersebut.]

[*Editorial Note*: The respondent has appealed to the Court of Appeal.]

Notes

For cases on promissory notes, see 10 *Mallal's Digest* (4th Ed) paras 467–508.

Cases referred to

Abirami Ammal & Anor v MSMM Meyappa Chettiar [1959] MLJ 149 (refd)

Tan Wee Han & Anor v Meyappa Chettiar [1951] MLJ 227 (refd)

Yik Wah Trading (Pte) Ltd v Tan King Kak & Anor [1972] 1 MLJ 94 (distd)

Legislation referred to

Debtor and Creditor (Occupation Period) Ordinance 1948 s 11
Moneylenders Ordinance 1951 s 16(1), (3)
Bills of Exchange Ordinance 1949 ss 13(2), 73(2)

Mohamed Hafiz (*Reginald Vallipuram & Co*) for the appellant.
CY Ong (*Ong & Ong*) for the respondent.

Mohd Ghazali JC: This is an appeal against the decision of the sessions court judge, Sessions Court, Johor Bahru, dismissing the claim of the appellant under the Moneylenders Ordinance 1951 for RM43,050 inclusive of interest.

On 29 November 1985, the respondent borrowed RM35,000 from the appellant, a private limited company carrying on the business of licensed moneylenders, to be repaid within a period of one month with interest at the rate of 12%pa. Both parties signed a memorandum (exh P2) which contained the terms of the contract as required under s 16(1) of the Moneylenders Ordinance 1951. The loan was due to be paid on

29 December 1985 but the respondent failed to pay the sum borrowed and the interest due and hence these proceedings.

According to the appellant, a few days before payment was due the respondent brought a cheque (exh P3) dated 29 December 1985 issued by Multisan Orchids Sdn Bhd, a company in which the respondent was the managing director, for the principal amount of RM35,000. However, on 28 December 1985, the respondent requested him not to bank in the cheque as there were insufficient funds in the account. The respondent also requested for an extension of time for an indefinite period to repay the loan. Subsequently, the respondent delivered another cheque for RM1,750 (exh P4) dated 29 January 1986 for payment of interest but before that date, again requested the appellant not to bank in this cheque due to there being insufficient funds. The appellant insisted that the loan was unsecured and therefore no security needed to be furnished. That being so, no particulars of any security was entered in the memorandum (exh P2).

The respondent, however, gave another version. He gave evidence that the appellant requested for security in the form of a postdated cheque from Multisan Orchids Sdn Bhd and thus, on the day the memorandum was signed, he handed a cheque for RM35,000 (exh P3). He gave evidence that he had borrowed the money from the appellant as Multisan Orchids Sdn Bhd needed money for its business operations and that it was the appellant who insisted that the loan be secured by a postdated cheque from the said company.

At the hearing of the appeal, counsel for the appellant restricted his submission to only one ground, namely, that the sessions court judge erred in law when he held that failure to mention the postdated cheque in the memorandum was a non-compliance with s 16(3) of the Moneylenders Ordinance 1951 and was fatal to the claim. Although his grounds were somewhat skeletal and lacking in substance, it was clear that the sessions court judge had accepted the respondent's version, namely, that the postdated cheque was handed to the appellant on the same day when the memorandum was signed and since it was a security for the loan, its omission from the memorandum was fatal to his claim as the requirements of s 16 of the Moneylenders Ordinance 1951 had not been complied with. This seems to be his main and only reason for dismissing the appellant's claim.

The sessions court judge held that P3 was a postdated cheque based upon the respondent's evidence that the serial numbers of several other cheques (not related to the loan) issued by Multisan Orchids Sdn Bhd showed that the said postdated cheque was issued prior to some of these cheques which were as follows:

Cheque No	Date of issue
176124	6 November 1985
176125	13 November 1985
176126 (exh P3)	29 December 1985

176127	29 November 1985
176128	29 November 1985
176140	9 December 1985
176141	24 December 1985
176142 (exh P4)	19 January 1986

The sessions court judge had made a finding of fact that P3 was a postdated cheque and I cannot find anything erroneous with his finding. It was a finding based on the credibility or bearing of a witness and I see no reason why I should disturb it.

However I find that he had failed to address his mind to the main issue in this case, namely, whether a postdated cheque is a security within the contemplation of s 16(1) of the Moneylenders Ordinance 1951. As far as the sessions court judge was concerned, the appellant's claim failed as there was no reference to the postdated cheque in the memorandum. That to my mind is not enough. He has to first decide whether a postdated cheque can be a security within the contemplation of the Moneylenders Ordinance 1951.

The requirements of s 16 of the Moneylenders Ordinance 1951 with regard to security is best explained in the case of *Abirami Ammal & Anor v MSMM Meyappa Chettiar* [1959] MLJ 149 at p 151, where the judge said:

> Section 16 of the Ordinance clearly differentiates between the contract for the repayment of the loan and any security given in respect of that contract and it is of the contract that the note or memorandum must be delivered. That note or memorandum is required to contain all the terms of the contract and where it was a term of the contract that a particular security be given in respect of it, the particulars of that security would require to be stated either in terms or by reference (see *Reading Trust Ltd v Spero* [1930] 1 KB 492). Nevertheless the Ordinance treats the contract and the security in respect of it as separate and distinct things. There may be a contract without security; there may be a contract with security. In either case the note or memorandum must embody the terms of the contract and in the latter case it must also embody in one way or another the terms of the security.

I do not think anyone is going to quarrel with what the judge said in the case referred to above with regard to the requirements of s 16 of the Moneylenders Ordinance 1951. Under the Ordinance, a moneylender may lend money with or without security. But can a postdated cheque qualify as a security? The word 'security' is not defined in the Moneylenders Ordinance 1951. According to *Osborne's Concise Law Dictionary* (8th Ed) the word 'security' means:

> A possession such that the grantee or holder of the security holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after which satisfaction the balance of the property or fund belongs to the grantor. There are thus two persons with an interest but the right of one has precedence over the other.

In *Tan Wee Han & Anor v Meyappa Chettiar* [1951] MLJ 227 at p 229, in dealing with s 11 of the Debtor and Creditor (Occupation Period) Ordinance 1948, Taylor J said: A

> The word 'security' also has several meanings; sometimes it means the property:- where land is mortgaged the land is security for the debt; sometimes it means the instrument:- a mortgage is a security for money lent. In s 11 I think 'security' is used in the former of these senses; furnishing the security means making property available to be charged; executing the charge (which is formalizing the security) is provided for in those words. B

Halsbury's Laws of England (vol 32, 4th Ed) at p 59, in dealing with the topic 'Loans of money; Control of moneylenders', summarizes security for loans, at para 116, as follows: C

> The repayment of a loan may be secured by the giving of security in various forms, for example: (1) by the giving of a bill of sale over goods intended to remain in the borrower's possession; (2) by the mortgage of land or property other than personal chattels; (3) by the pawn or pledge of goods; (4) by the giving of a bottomry bond on a ship and cargo or a respondentia bond on the cargo alone; (5) by the issue of debentures or debenture stock or of a certificate of deposit; (6) by the deposit of bills of exchange, stock and shares, life assurance policies or documents of title to goods. D

From the above references, it is clear that the word 'security' would seem to imply something in addition to the mere obligation of the debtor, that is, something to which the creditor can resort in order to aid him in realizing or recovering the debt, in case the debtor fails to pay. However there does not seem to be any local authority on the question whether a postdated cheque can be termed a security within the contemplation of the Moneylenders Ordinance 1951. E

In criminal law, a postdated cheque is only a promise to pay upon the date to which it has been posted and the giving of a postdated cheque, which is later dishonoured, for goods already received does not constitute a criminal offence. According to 4 *Gour: Penal Law of India* (8th Ed) at p 3053: F

> A cheque is only a promise to pay, either on demand, or upon the date to which it has been posted. Therefore, the only effect of a receipt of payment by cheque is an acknowledgment that a promise to pay has been given by the drawer to the drawee. The receipt does not extinguish or release any legal right and is not a valuable security even within the last part of s 30. Where, therefore, a person gives a postdated cheque in payment for goods already received and the cheque is dishonoured, there is only a breach of promise for which the remedy lies in a civil court, but the person cannot be held guilty of cheating. G H

Under the Bills of Exchange Ordinance 1949 (Rev 1978), it would seem that postdated cheques are valid. Section 73(2) of this Ordinance provides: 'A cheque is a bill of exchange drawn on a banker payable on demand'; and s 13(2) provides: 'A bill is not invalid by reason only that it is antedated or postdated or that it bears a date on Sunday'. Thus a cheque comes under the term 'bill' used in s 13(2) of the Bills of Exchange I

Ordinance 1949 and therefore a cheque is not invalid by reason of it being postdated.

However a postdated cheque is not *payable on demand* and therefore, cannot fall within the definition of 'cheque' in s 73(2) of the Bills of Exchange Ordinance 1949. It becomes payable only at a future date. This would seem to imply that a postdated cheque has no value at the time it was issued as you cannot demand immediate payment for it. It is only tantamount to an acknowledgment of a debt or a mere promise to pay in the future. It does not represent any fund or property available immediately. Dr MJL Rajanayagam in his article, 'The Postdated Cheque and Holding in Due Course', published in *The Journal of Business Law* (1969) at p 33, is of the view that a postdated cheque is not a cheque in law. This is what he said at p 36:

> It is submitted that an instrument in the form of a cheque which is postdated is not a cheque in law. Therefore, a banker who pays such an instrument before the due date is unable to debit the customer's account with the amount.

It is clear that payment cannot be made before the date mentioned in a postdated cheque and that banks generally only allow payment to be made on its due date provided there are sufficient funds to cover it. It does not imply at all that the drawee already has money in the bank to the amount shown on the cheque at the time when it is first drawn. MS Parthasarathy in his book entitled *Cheques in Law and Practice* (2nd Ed, 1972) at p 31 said:

> However, if a postdated cheque is presented before the date it bears, the banker would do well not to pay it since the possibility of the cheque being countermanded, or the occurence of the customer's death, bankruptcy, etc, before the date of the cheque cannot be ruled out. In *Pollock v Bank of New Zealand* (1901) 20 NZLR 174, the bank was held liable for damages in circumstances arising out of the premature payment of a postdated cheque.

Counsel for the respondent made reference to the case of *Yik Wah Trading (Pte) Ltd v Tan King Kak & Anor* [1972] 1 MLJ 94 where cheques were also in issue in a moneylending dispute. In that case the court held, amongst other reasons, that the claim by the moneylender against the borrower failed as the former had failed to set out the exact terms of their contract with the alleged borrower and had also acted illegally in securing undated cash or bearer cheques from the alleged surety. The security given was in the form of a promissory note and the court found that the terms of the contract had not been set out accurately in the note. Furthermore the cheques were not made out in the name of the moneylender and thus the court held that the taking of such cheques were illegal as, being additional securities, it was omitted from the contract between the two parties. I find that this case has no bearing on the instant case as the facts there were different. Furthermore there was no discussion as to whether postdated cheques are securities within the contemplation of s 16 of the Moneylenders Ordinance 1951.

As it is clear that a postdated cheque is not payable on demand and hence cannot fall within the definition of 'cheque' in s 73(2) of the Bills of Exchange Ordinance 1949 (Rev 1978), it is my finding that it is not a security within the contemplation of s 16 of the Moneylenders Ordinance 1951. It has no value as it does not represent any property that a creditor can resort to in the event he wants to realize or recover the debt. It is nothing more than a promise to pay on a date in the future. Technically it is not even a cheque as it is not payable on demand. In the instant case, it is my finding that the memorandum (P2) signed by both the appellant and respondent had complied with the requirements of s 16 of the Moneylenders Ordinance 1951 and the contention that the memorandum has to include or make reference to the postdated cheque (P3) does not arise at all.

For the above reasons I would allow this appeal with costs here and below.

Appeal allowed.

Reported by Kevin Ooi